Supreme Court, U.S.
FILED
MAY 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1627

In the Supreme Court of the United States

OCTOBER TERM, 1990

DEIRDRE V. BATCH,
PETITIONER

v.

TOWN OF CHAPEL HILL,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT TOWN OF CHAPEL HILL IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Can a municipal government, when authorized by state statute, require that a subdivision of property coordinate the development of the property with future street plans of the municipality?

2. Where a local government validly and lawfully rejected a particular plan of subdivision, for failure to coordinate with future streets, was there any violation of the Civil Rights Act, 42 U.S.C. § 1983?

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N.C.R.Civ.P. 56 5

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED IN THE CASE

In addition to the constitutional provisions and statutes cited by the Petitioner, N.C. General Statutes § 160A-372, the statute under which the Town Council of Chapel Hill acted, is relevant and reads in pertinent part as follows:

> A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision or, alternatively, for provision of funds to be used to acquire recreation areas serving residents of the development or subdivision or more than one subdivision or development within the immediate area, and rights-of-way or easements for street and utility purposes and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions essential to public health, safety, and the general welfare. The ordinance may include requirements that the final plat show sufficient data to determine readily and reproduce accurately on the ground the location, bearing, and length of every street and alley line, lot line, easement boundary line, and other property boundaries, including the radius and other data for curved property lines, to an appropriate accuracy and in conformance with good surveying practice.

STATEMENT OF THE CASE

As Petitioner correctly states in her recital of the facts, she purchased her property, not with the intent to subdivide, but with the intent to live on it. She offered evidence that she was not aware of the future street plans of Town; there was uncontradicted evidence that these

plans were of public record prior to her purchase of the property, having been approved by the Towns of Chapel Hill and Carrboro and the North Carolina Department of Transportation, and that local realtors were aware of the plans and ethically obliged to bring them to the attention of a potential purchaser of property.

The plans showed a two-lane thoroughfare, Laurel Hill Parkway, within a 90-foot right-of-way. Petitioner's proposed subdivision provided for a two-lane subdivision street within a 50-foot right-of-way. The Parkway will provide access to Petitioner's property and allow travel from it to other parts of the surrounding community.

When informed by the planning staff of the Town that her particular proposed subdivision did not coordinate with future street plans, Petitioner made no significant alterations in her subdivision plans; she elected to stand or fall with her original proposal. In acting upon and rejecting that particular proposal, the Town Council did not attempt to require her to give any of her property to the Town, and simply rejected the particular application for failure to comply with the enabling statute and the controlling ordinance, in that the application failed to coordinate with, and was contrary to, the settled future street plans of the Town. We are aware of no evidence in the Record which substantiates Petitioner's argument that the Town acted in order to reduce or altogether avoid future condemnation costs. Additional facts are accurately set forth in the opinion of the Supreme Court of North Carolina.

In the hearing before the trial court, Petitioner offered no evidence that her property becomes totally worthless, nor even evidence that its value would be substantially diminished, by the failure of the Town to approve this one particular subdivision application. The Supreme Court of North Carolina was careful to note that Petitioner is free to make other subdivision applications or to seek to use her property in other ways.

SUMMARY OF ARGUMENT

1. The Town's rejection of one particular subdivision plan for its absolute failure to coordinate with the Town's future street and transportation plans did not constitute a taking of Petitioner's property and infringed no principles of either state or federal law.

2. The proceedings in state court did not deprive the Petitioner of the right to be heard on her claim for violation of the Civil Rights Act; she was heard, and for valid reasons the claim was decided against her.

ARGUMENT AND AUTHORITY

I. THE TOWN LAWFULLY REJECTED PETITIONER'S SUBDIVISION PLAN FOR ITS FAILURE TO COORDINATE WITH PLANNED STREETS; THIS REJECTION DID NOT CONSTITUTE A "TAKING" NOR WAS IT AN EFFORT TO ACQUIRE PETITIONER'S PROPERTY WITHOUT PAYMENT OR AT A REDUCED PRICE.

Subdivision is not a favorite of the law. There is no absolute right to it, normally its denial does not deprive property of all reasonable value, and the usual purpose of subdivision is to allow a significant profit to the subdivider.

What subdivision is really about was well stated in 52 Cornell L.Q. 871, 923 (1968):

> "The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations."

Both federal and state decisions have long made it clear that the power of local governments to deny or con-

dition subdivision is indeed broad. The general law was well summarized in 11 A.L.R.2d 524, 537:

> "The contention that conditions imposed upon approval of a proposed subdivision plat or map are invalid as constituting a veiled attempt to exercise the power of eminent domain has, under the facts and circumstances disclosed in the particular cases, been consistently rejected."

In the Fourth Circuit, where this case arose, the Court of Appeals has held that even a requirement of dedication—which Petitioner without basis contends occurred in the case at bar—does not constitute a taking. In *Coastland Corp. v. County of Currituck*, 734 F.2d 175, 179 (4th Cir. 1984), the court said:

> "It is common for subdivision regulations to require the developer to dedicate portions of its land for public streets as a condition precedent to approval of its plat. There is no unconstitutional taking where the land use plan was in effect before the plat was submitted for approval and where the developer was not obliged to dedicate his land as a public street except as a condition to the approval of the plat."

The reliance of the Petitioner on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1978), is definitely misplaced. There, California in effect forbade any reasonable use of the property, except upon the gratuitous dedication by the owner, to the public, of a substantial property right. Contrast the case at bar: Petitioner is not only free to use her property for the purpose for which she bought it; she never introduced any evidence that her failure to obtain approval for one particular design for her subdivision either renders her property worthless or so substantially reduces its value as to amount to the same thing. A glance at the map included in the opinion of the Supreme Court of North Carolina instantly shows that she can divide her property into several lots, no doubt at substantial

profit, while still achieving a result which does not contradict the future street plans of the Town. Her taking claims are not ripe. *MacDonald, Sommer and Frates v. Yolo County*, 477 U.S. 340 (1986).

II. PETITIONER WAS NOT DEPRIVED OF A HEARING ON HER CIVIL RIGHTS ACT CLAIM; SHE WAS HEARD, AND SHE LOST.

Petitioner elected to combine in one proceeding, in the North Carolina trial court, a petition for certiorari to review the decision of the Town Council, and a civil action to state a claim under the Civil Rights Act and other theories. The Town promptly objected to this joinder, but the Petitioner elected to continue with this civil matter in the form she had filed it in the trial court and filed a motion for summary judgment as to all claims. Affidavits were filed by both parties and the trial court held a lengthy hearing on summary judgment. The Supreme Court of North Carolina ultimately determined that the joinder of the two proceedings was procedurally improper, but nevertheless dealt with the merits of both the certiorari proceeding and the complaint. After affirming the Town Council's action based on the administrative record, the Supreme Court of North Carolina quite logically held that if that review reveals no violation of law, the Petitioner simply has no complaint, either under the Civil Rights Act or by any other theory. Of course, under North Carolina Rule 56, as under F.R.Civ.P. 56, a party filing a summary judgment motion always risks an adverse summary judgment.

CONCLUSION

The Town of Chapel Hill submits that the Petition should be denied. Only one of many possible subdivision plans has been disapproved, and for a valid reason; if municipalities could not require that subdivisions coordinate with the future transportation needs of the community, developmental chaos would result. The most significant

aspect of the facts in this case is an absence of fact: the total failure of the Petitioner to show that, without approval of this one particular plan, her property is deprived of all reasonable value and therefore "taken." The Supreme Court of North Carolina properly disposed of the present case, and properly reminded the Petitioner that the door is open for her to submit other and different applications for the reasonable use of her property.

This 14th day of May, 1990.

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CERTIFICATE OF SERVICE

I, John V. Hunter III, attorney for Respondent Town of Chapel Hill, certify that I served the foregoing Memorandum on the 14th day of May, 1990, upon the following parties, and in the manner below specified, by placing three copies thereof for each such party in a separate franked envelope bearing sufficient first-class postage and depositing the same in the United States mail at Raleigh, North Carolina:

Party	Addressee of Party's Copy
Petitioner	Michael B. Brough

Address to Which Party's Copy Mailed (Last Known Address of Addressee)

Michael B. Brough & Assoc.
1829 E. Franklin Street
800-A
Chapel Hill, N.C. 27514

This 16th day of May, 1990.

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